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No. 85-1222

In the Supreme Court of the United States

OCTOBER TERM, 1985

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

STATE OF TEXAS, RESPONDENT

REPLY BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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TABLES OF AUTHORITIES

Cases:	Page
American Trucking Ass'ns v. *A.T. & S.F. Ry. Co.*, 387 U.S. 397 (1967) (ATA I)	3
American Trucking Ass'ns v. *ICC*, 656 F.2d 1115 (5th Cir. 1981) (ATA II)	3
Hansen v. *Norfolk & Western Ry. Co.* 689 F.2d 707 (7th Cir. 1982)	3
Thomson v. *United States*, 321 U.S. 19 (1944)	2
Transcontinental Gas Pipe Line Corp. v. *State Oil & Gas Board*, 106 S.Ct. 709 (1986)	1, 2

Statutes:

Interstate Commerce Act:	
49 U.S.C. 10101a(9)	1
49 U.S.C. 10501(d)	2, 3
49 U.S.C. 11501(b)	2, 3
49 U.S.C. 11501(b)(4)(B)	3

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1. Respondent makes no attempt to defend the practical result produced by the court of appeals' decision—the creation of two separate regulatory regimes (one exempt, one non-exempt) as to otherwise identical TOFC/COFC movements performed by interstate rail carriers where one terminates inside Texas and the other does not. This is precisely the evil—dual regulatory standards for identical railroad-provided services—that Congress intended to eradicate through the expressly pre-emptive scheme of the Staggers Act. (See Pet. 16-19.) Since our petition was filed, this Court overturned a state regulation inimical to a federal deregulatory scheme because "Congress, in revising a comprehensive regulatory scheme to give market forces a more significant role" did not "intend to give the States the power it had denied" the federal agency. *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board*, ____ U.S. ____, 106 S. Ct. 709, 717 (1986). In the present case, the specific deregulatory action (the TOFC/COFC exemption) is an administrative initiative taken in furtherance of statutory command. But the ICC's mandate "to assure that intrastate regulatory jurisdiction is exercised in accordance with the [federal] standards," 49 U.S.C. 10101a(a)(9), is, we submit, far clearer and less

ambiguous[1] than the pre-emptive intent found by this Court in the recent natural gas legislation at issue in *Transcontinental.* The directive that the ICC and certified states shall exercise "exclusive" jurisdiction over transportation provided by rail carriers, using uniform federal standards and procedures, 49 U.S.C. 10501(d), 11501(b), requires no inferences as to congressional intent.(See Pet. 7-9.) Apparently recognizing this, respondent does not even attempt to reconcile the decision below with the pre-emption embodied in the Staggers Act, but instead seeks refuge (Br. 3) in the mere absence of amendments to the "motor carrier" provisions of the Interstate Commerce Act.

2. The central issue is whether the court of appeals erred—and placed itself in conflict with the pre-emptive scheme of the Staggers Act and decisions of other courts—by redefining the portion of a continuous intrastate TOFC/COFC intermodal movement that is performed in a *railroad-owned* truck as "motor carriage," thus subjecting that part of the railroad's through service to plenary state regulatory jurisdiction, unfettered by the expressly pre-emptive uniform standards of the Staggers Act. Respondent follows in the path of the court of appeals by begging this fundamental question: it offers only *ipse dixits* that the service is "intrastate motor carriage" (Br. 2,4) and "intrastate motor traffic" (Br. 3,4).[2]

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[1] See *Transcontinental, supra*, 106 S. Ct. at 722 (Rehnquist, Powell, Stevens, and O'Connor, JJ., dissenting) (state regulation that interferes with federal price deregulation distinguished from rules defining property or contractual rights).

[2] Respondent quibbles (Br. 4) over the relevance of this Court's *Thomson* decision (Pet. 13), asserting that *Thomson* shows railroad-owned trucking to be *ipso facto* "motor carriage." In fact, as we earlier stated, *Thomson* recognized that there is no automatic equivalence between the two. The particular service in *Thomson* involved separate "motor vehicle operators" acting as "independent con-

Respondent makes no mention of either Section 10501(d) or the pre-emptive language of Section 11501 (compare Pet. 7-9). Respondent even asserts (Br. 4) that the uncertified status of the Railroad Commission of Texas is "immaterial" because the transportation is "motor carriage." This entirely overlooks the existence of a pre-emptive provision expressly addressed to uncertified states: "[a]ny *intrastate transportation provided by a rail carrier* . . . shall be deemed to be transportation subject to the jurisdiction of the Commission under [Sections 10501 *et seq.*]" 49 U.S.C. 11501(b)(4)(B) (emphasis added). See Pet. 8-9.

3. Respondent never mentions the crucial statutory language, "transportation provided by a rail carrier," previously held to include the portion of TOFC/COFC movements performed in railroad-owned trucks. The Fifth Circuit's *ATA II* decision, for example, is spuriously distinguished as dealing with "motor carrier traffic" (Br. 3) when the holding there (656 F.2d at 1120) plainly rested on the "provided by a rail carrier" language. (See Pet. 15.) Respondent makes no attempt whatever to distinguish the later *Hansen* decision on the same point (Pet. 16) in the Seventh Circuit.

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tractors" (321 U.S. at 24,25) who were found not to be necessarily entitled to motor-carrier "grandfather" rights when engaged in connecting service with the railroad. *Id.* at 25-26. This does not diminish the applicability of the general principle that no inherent equivalence exists between "motor carriage" and a through movement traveling partially in a railroad-controlled truck.

In apparent recognition of this reality, respondent makes no attempt to impugn this Court's subsequent decision upholding ICC jurisdiction over intermodal activities by railroads in *ATA I* (Pet. 13). Inded, *ATA I* deplored "statutory compartmentalization" of intermodal service, such as respondent attempts here. 387 U.S. at 420 n. 10.

CONCLUSION

For these reasons and those stated in our petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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